

Resolution No.:	<u>17-286</u>
Introduced:	<u>October 18, 2011</u>
Adopted:	<u>October 18, 2011</u>

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY**

By: District Council

SUBJECT: APPLICATION NO. G-892 FOR AMENDMENT TO THE ZONING
ORDINANCE MAP, Robert R. Harris, Esquire and Cindy Bar, Esquire,
Attorneys for Applicant, Chelsea Residential Associates, LLC, OPINION AND
RESOLUTION ON APPLICATION Tax Account No. 13-03381404

OPINION

Local Map Amendment (LMA) Application No. G-892 was filed on January 4, 2011, and it requests reclassification of 5.25 acres of land located at 630 Ellsworth Drive, Silver Spring, Maryland, from the existing R-60 Zone to the RT-15 Zone. The property, whose legal description is Lot 58, Evanswood Section 1, is situated on the south side of Springvale Road between Ellsworth Drive and Pershing Drive. The land is owned by the Chelsea School (tax account number 13-03381404), a private educational institution which desires to relocate its facilities and has entered into a contract of sale with the Applicant. Exhibit 45, p. 3; 5/26/11 T. 71.

The application was filed under the Optional Method authorized by Zoning Ordinance §59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging. Applicant proposes to build a development that consists of 76 new townhomes, including sixty-seven market-rate units and ten moderately priced dwelling units (MPDUs). The Applicant also proposes to rehabilitate the existing historic resource on the property, the Riggs-Thompson House, and convert it to a single-family detached privately owned residence. The proposal is set forth in a revised Schematic Development Plan (SDP), Exhibit 253(a)(corrected), which contains an illustrative diagram and a specification of 10 binding elements, as well as other information regarding the development.¹

Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) reviewed the plans, and in a report dated May 9, 2011, recommended approval

¹ On September 15, 2011, the Applicant submitted a revised SDP correcting a technical error in the SDP previously submitted (Exhibit 253(a)). The most recent SDP has been marked for the record as Exhibit 253(a)(corrected). For ease of reference, this will be referred to as Exhibit 253(a) throughout this Resolution.

(Exhibit 45). The Montgomery County Planning Board considered the application on May 25, 2011, and voted to recommend approval with one member dissenting. The Planning Board's recommendation is contained in a memorandum dated May 26, 2011 (Exhibit 103). The Planning Board also solicited comments from Staff to the Historic Preservation Commission because the proposed private access road bisected the environmental setting of the Riggs-Thompson House. The Board supported the binding elements proposed by the Applicant that addressed concerns raised by members of the community. The Planning Board also included a memorandum from Staff to the Historic Preservation Commission (HPC) as an attachment to the Board's recommendation. Exhibit 107. HPC Staff urged the Applicant to consider alternative alignments of the private road which were "more consistent with Chapter 24A" of the County Code. That Chapter sets forth the standards for construction of improvements within an environmental setting. Prior to the public hearing before the Hearing Examiner, the Applicant on the binding element considered by the Planning Board which prohibited access from the site onto Springvale Road.

A public hearing was duly noticed and convened on May 26, 2011, June 6, 2011, June 27, 2011, June 30, 2011, and July 18, 2011, at which time the Applicant presented testimony from eighteen witnesses, including the Applicant's expert witnesses, in support of the application. One of the witnesses appeared on behalf of the Coalition for Smarter Growth and the Washington Sustainable Growth Alliance, which awarded preliminary recognition of the development for implementing smart growth principles. At the July 18, 2011, public hearing, the Applicant also proposed an additional five alternative alignments of the private road to address the concerns raised by HPC Staff. Exhibits 223-227. The Hearing Examiner referred these potential alignments, including the alignment shown on the SDP, to Technical Staff for their review. Technical Staff responded on July 22, 2011, advising that three of the alignments proposed were potentially supportable by Technical Staff, if several issues could be resolved. Exhibit 232. Technical Staff did not find the particular alignment shown on the Schematic Development Plan supportable because of its impact on the environmental setting of the Riggs-Thompson House.

Twenty-two individuals testified in opposition to the application. Some of these individuals appeared on behalf of civic and community organizations, including the Seven Oaks-Evanswood Community Association (SOECA), and Montgomery Preservation Inc.²

Ms. Anne Spielberg testified on behalf of SOECA. SOECA opposed the application because it is inconsistent with the 2000 North and West Silver Spring Master Plan, the density is too high given the surrounding land uses, and the density proposed intrudes into the neighborhood rather than providing a buffer or transition from the Silver Spring Central Business District.

Montgomery Preservation Inc. opposed the density of the development as well as the private road bisecting the environmental setting of the Riggs-Thompson House. They testified that the density and private road compromised the historic setting of the house.

² In addition to those organizations represented at the public hearing, an additional five organizations, the South Four Corners Civic Association, the East Silver Spring Citizens Association, the Park Hills Civic Association, the Woodside Park Civic Association, and the Montgomery Civic Federation, submitted letters of opposition into the record of the case.

After the hearing was completed, the record was held open for written closing arguments and filing, by the Applicant, of the executed covenants and the revised plans, including modified binding elements. The parties timely filed their closing arguments and the Applicant filed its proposed covenants and final SDP (Exhibit 253). The record closed, as scheduled, on August 5, 2011.

The Hearing Examiner's Report and Recommendation was filed on September 22, 2011, and it is incorporated herein by reference. The Hearing Examiner found that (1) the density and massing of the development is incompatible with the surrounding land uses; (2) the Applicant failed to meet its burden of proof that the three road alignments which were supportable by Technical Staff were viable and would not adversely impact the community; (3) the density proposed was inconsistent with the Master Plan; and (4) the environmental setting shown on the SDP was inconsistent with the Master Plan. Because the R-T Zone did further some aspects of the Master Plan's goals, the Hearing Examiner recommended remanding the case to permit the Applicant to revise the SDP to reduce the density and massing, address the open issues on the potential road alignments, and revise the SDP to be consistent with the environmental setting for the Riggs-Thompson House designated in the Master Plan.

After a careful review of the entire record, the District Council finds that the application should be remanded to the Hearing Examiner for the reasons stated in the Hearing Examiner's Report and Recommendation.

The Property, Surrounding Area and Zoning History

The subject property consists of 5.25 acres located on the south side of Springvale Road between Ellsworth Drive and Pershing Drive. It is currently zoned R-60.

The subject property is generally rectangular in shape and has a 6 percent decrease in slope from east to west. The Chelsea School, a private educational institution for individuals with learning disabilities, currently occupies the property. The property is improved with approximately 40,000 square feet of school buildings as well as a 70-space asphalt parking lot and the Riggs-Thompson House. Exhibit 45; 5/26/11 T. 48-49. Springvale Road, bordering the northern property line, is a narrow street with no curb or gutter and many of the streets in the area do not meet current county standards. The property contains many mature trees, especially in the southern portion of the property.

The subject property is separated from the boundary of the Silver Spring Central Business District (i.e., Cedar Street to the south of the subject property) by a row of single-family detached houses which are recommended for non-resident professional office special exceptions in the Master Plan. Some but not all of these houses have approved special exceptions; others remain single-family homes. Access and turn restrictions on the surrounding neighborhood streets have been in place since the early 1990's in order to prevent traffic traveling north and south between the Beltway and the Silver Spring Central Business District from cutting through the immediately surrounding neighborhood. Exhibit 154; 6/6/11 T. 196-201.

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. In general, the definition of the surrounding area takes into account those

areas that would be most directly affected by the project. Technical Staff adopted the Applicant's proposed delineation of the surrounding area, which was bounded by Georgia Avenue to the south, Dale Drive to the north, Colesville Road to the west and Wayne Avenue to the east. Both Technical Staff and the Applicant based the delineation on the fact that it captured the entire transition in density from the core of the Silver Spring Central Business District to R-60 zoning surrounding the subject property. The Planning Board found that the northern and southern boundaries recommended by Technical Staff and the Applicant were too broad and recommended narrowing those boundaries.

Before the Hearing Examiner, the Applicant revised its northern and southern boundary to be Woodside Parkway to the north and Fenton Street in the Silver Spring Central Business District to the south because these were within a quarter-mile radius, or 5-minute "walk radius" from the subject property. The Applicant also believed that this boundary left the subject property in the center of the density transition between the Central Business District core and the R-60 Zone beginning north of Cedar Street. The opposition's expert land planner agreed that Colesville Road and Wayne Avenue formed the western and eastern boundaries of the surrounding area, but opined that the southern boundary should be the single-family detached houses on the north side of Cedar Street, the border between the North and West Silver Spring Master Plan and the Central Business District. Because the zoning from Cedar Street north to Dale Drive is almost entirely R-60 and a high berm and mature trees along Cedar Street physically separate the subject property from the Central Business District, the opposition land planner opined that the appropriate southern boundary was Cedar Street on the south and three blocks north of the subject property to the north.

The Hearing Examiner concluded that the appropriate delineation of the surrounding area should be Fenton Street to the south, Dale Drive to the north, Colesville Road to the west, and Wayne Avenue to the east. The parties failed to direct the Hearing Examiner to any authority to support the opposition's position that the surrounding area should be defined by physical barriers and planning techniques rather than direct impacts of the proposed development. Because the only evidence in the record on the impact of the development to the south is the 5-minute walk radius submitted by the Applicant, the Hearing Examiner found that the southern boundary should be Fenton Street. The Hearing Examiner found that the northern boundary should be Dale Drive due to the evidence that traffic from the development travels north along Pershing Drive and Ellsworth Drive to Dale Drive in order to access Colesville Road.

Based on this surrounding area, the Hearing Examiner characterized the surrounding land uses generally as widely diverse, including commercial, civic and multi-family residential uses in the Silver Spring Central Business District and single-family detached houses north of Cedar Street. The Hearing Examiner found, however, that the abrupt transition in land uses which occur at Cedar Street, with much more intense uses south in the Central Business District and primarily single-family detached houses north of Cedar Street, is central to the area's character. Certain non-residential uses are on the edges of the area, such as Colesville Towers, built in the 1960's, and the Springvale Terrace retirement community, a special exception in the R-60 zone, but these uses were either significantly buffered from the interior neighborhood or were very low-impact so as not to change the existing single-family detached character of the area north of Cedar Street.

Technical Staff provided the zoning history of the subject property. In 1958, when the County was comprehensively rezoned, the subject property was placed in the R-60 Zone, which has been continuous since that time. The property has been operated as a school since the 1930's. Initially, it was a parochial school which operated without a special exception. In the late 1990's, the Chelsea School began leasing a portion of the subject property and then purchased the entire property in order to expand. The Board of Appeals approved a special exception for the Chelsea School expansion on March 5, 2000. Because of declining enrollment, however, the Chelsea School never implemented its expansion plans.

Proposed Development and Binding Elements

The Applicant proposes to remove the existing school buildings and certain non-contributing additions to the Riggs-Thompson House and construct 76 townhouses. It would also renovate the Riggs-Thompson House as a single-family detached private home. The Applicant proposes to include 10 Moderately Price Dwelling Units (MPDUs), which equates to 12.5% of the new dwelling units. The townhouse rows or strings will be aligned perpendicular to Springvale Road with cosmetic fronts facing the road in order to simulate single-family detached homes from the perspective of the properties directly confronting to the north. The Applicant proposes a 25-foot setback along Springvale Road, and subject to site plan review, a double-row of landscaping along the road.

The fronts of the townhouse strings will face each other with landscaped "courtyards" separating the rows. The rear of the units will face alleys containing parking and rear decks. All of the units have garages and two parking spaces, although some of the units will have tandem parking spaces. Exhibit 253(a). There will be some spaces for visitor parking.

The environmental setting of the Riggs-Thompson House is depicted on the Schematic Development Plan as consisting of 37,056 square feet on the eastern side of the site. The Applicant proposes to remove certain non-contributing additions to the house and convert the house to a private, single-family detached home.

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the "optional method" of application. The optional method requires submission of a schematic development plan (SDP) that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding on the SDP must be set forth in a Declaration of Covenants to be filed in the county land records if the rezoning is approved. The Applicant's final SDP (Exhibit 253(a)) sets forth the 10 binding elements for the development as follows:

BINDING ELEMENTS

1. The maximum number of units will be 77 (76 townhomes and 1 single family detached).
2. The Applicant, its successors and assigns will record a public access easement allowing public use of the designated public green space along Ellsworth Drive, Springvale Road and Pershing Drive, with the specific size, configuration and location of this easement subject to final site plan approval.

3. Townhouse units confronting Springvale Road will be designed to have their fronts facing Springvale Road.
4. The project will provide green area of at least 40% of the net tract. The townhouses will be located in a manner that will provide green areas along Pershing Drive and Ellsworth Drive and a linear green area along Springvale Road, all generally consistent with the schematic development plan with the specific size, configuration and location subject to final site plan approval.
5. The applicant, its successors or assigns, will preserve the Riggs-Thompson House.
6. The Applicant, its successors and assigns shall abide by the existing traffic restrictions on Springvale Road, Ellsworth Drive and Pershing Drive so long as those restrictions remain in effect.
7. The maximum building height will be 35 feet.
8. The project will provide a minimum of 2 parking spaces per unit plus additional spaces for guest parking.
9. The historic setting for the Riggs-Thompson House will remain at a minimum of 37,056 square feet, subject to HPC approval of a possible access road to Pershing Drive.
10. The set-back along Springvale Road shall be a minimum of 25 feet, and, subject to site plan approval, will include a double row of trees.

Applicant has also filed an executed copy of the Declaration of Covenants in the record of this case as Exhibit 253(d), and it contains the binding elements listed above, as required. The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a schematic development plan amendment.

The graphic portion (*i.e.*, site layout) of the revised SDP (Exhibit 253(a)) is illustrative (except as specified in the binding elements). The plan shows 76 townhouses (ten of which are MPDUs), in strings of 8 units each, aligned perpendicular to Springvale Road. A binding element requires a 25-foot setback from Springvale Road, although the double row of street trees contained within that binding element is subject to site plan review. Binding Element No. 3 requires the Applicant to design the end-cap units facing Springvale Road with cosmetic fronts.

Binding Element No. 4 requires the Applicant to provide public access areas along Pershing and Ellsworth Drives, with the exact configuration and location to be determined at site

plan review. Overall, the development includes 40% green space, as opposed to the minimum of 30% required in the R-T 15 Zone.

Binding Element No. 6 requires the Applicant to observe the existing traffic restrictions contained in the streets immediately surrounding the subject property.

Binding Element No. 9 requires the Applicant to maintain an environmental setting of at least 37,056 square feet, subject to HPC review. The size of the environmental setting of the Riggs-Thompson House designated by the Master Plan was the source of much controversy before the Hearing Examiner, described below.

Standard for Review

A floating zone, such as the RT-15 Zone, is a flexible device. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed development will be consistent with the purpose and regulations of the proposed zone and compatible with the surrounding development, as required by the case law, *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967). The Council must also find that the rezoning will be in the public interest as part of the coordinated and systematic development of the regional district, as required by the *Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110*.

Requirements and Purpose of the Zone

Under the “purpose clause” set forth in Zoning Code §59-C-1.721, the R-T Zone may be applied if a proposal meets any one of three alternative criteria: (1) it is in an area designated for R-T Zone densities (implying a master plan designation); (2) it is in an area that is appropriate for residential development at densities that are allowed in the R-T Zones; or (3) it is in an area where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.

The District Council agrees with the Hearing Examiner’s conclusion that the 2000 North and West Silver Spring Master Plan did *not* designate this subject property for R-T Zoning.

The evidence in this case supports the Applicant’s contention that an R-T Zone is appropriate at this location, although not at the density proposed. The Applicant’s land planner testified that the development of the townhomes confirmed the residential use of the area, and eliminated some of the commercial-type aspects of the institutional use, such as truck traffic and school bus parking. Because the R-T Zone permits more flexibility in design than the underlying R-60 Zoning, the R-T Zone allowed the developer to provide more public access space and green space, and improvements to the existing streets, including sidewalks and landscaping, thus enhancing access to the amenities in the Central Business District. These amenities include access to civic, neighborhood-serving retail uses, and transit.

The District Council agrees with SOECA, and others opposing the Application, however, that an additional transition is not necessary between the higher density multi-family residential uses in the Central Business District and the single-family detached homes north of Cedar Street. The opposition’s land use planner testified that single-family houses on the north side of Cedar

Street rest on a high berm and contain many mature trees that continue through the southern portion of the subject property. The berm and mature trees effectively screen the view of the Central Business District from those who live along Springvale Road and other areas, and even serve to screen uses such as Colesville Towers, an older 275-unit multi-family residential development, which are considered to be within the surrounding area.

Because the District Council agrees that R-T Zoning is appropriate for the site, but finds that the schematic development plan is neither consistent with the Master Plan nor compatible with uses in the immediately surrounding area, the Council agrees with the Hearing Examiner that the application should be remanded for revisions to address those issues, detailed below.

Having addressed the purpose and intent of the R-T 15 Zone, we now turn to the statutory requirements of the Zone. The Applicant's proposal complies with all of the development standards and special regulations of the RT-15 Zone save two, one of which may be varied under specific circumstances.

The first is the requirement of a thirty-foot setback from land classified in a one-family detached zone. The Applicant proposes a 20-foot setback from the rear yards of the single-family detached houses along the north side of Cedar Street, which are recommended in the Master Plan for non-resident professional office and which are zoned R-60. Zoning Ordinance 59-C-1.732(a), Note 1, permits a reduction of the setback if "...a more desirable form of development can be demonstrated by the applicant to the satisfaction of the planning board..." Technical Staff recommended approval of a reduced setback in order to permit the 25-foot setback along Springvale Road on the northern boundary of the site. The Planning Board adopted Technical Staff's in their recommendation.

The opposition objected to the density of the development partially because it would remove many of the existing mature trees on the site which currently screen the neighborhood from views of the Central Business District and other uses, such as Colesville Towers, within the surrounding area. Because the District Council is hereby remanding the case for revision at a lesser density, this is an issue that need not presently be addressed.

Section 59-C-1.722 also requires townhouse rows to be staggered so that a maximum of only three townhouses in the same row should have the same frontage. If there are more than three townhouses in a row, the building frontages must be staggered by at least two feet between the groups of three units. The Zoning Ordinance permits a waiver of this requirement, but only if the development proposes more than 12.5% MPDUs. In this instance, the schematic development plan proposes the minimum number of MPDUs, so this requirement should be addressed on remand as well.

Compatibility

An application for a floating zone reclassification must be evaluated for compatibility with land uses in the surrounding area. The compatibility of the development with the predominantly single-family homes north of Cedar Street was an issue of much controversy at the public hearing.

The Applicant's land planner testified that the density of the proposed development was compatible with the surrounding area because of its proximity to Metro and the Silver Spring Central Business District. He opined that any lesser density would result in a gross underutilization of the site. He asserted that townhouses are inherently compatible with single-family detached homes because both are single-family residential uses which are owned in fee simple and because they are allowed in all single-family detached zones.

The Applicant also argued that the density of the development was compatible with the surrounding area by relying on the "tent effect" principle applied in the 2000 Silver Spring Central Business District Sector Plan. He opined that beginning with a density of 430 dwelling units per acre at the core of the Central Business District, the proposed development was an appropriate transition to the R-60 single-family detached houses located to the north of the subject property.

He also asserted that there were eight metrics to compatibility, including (1) compatibility of land uses, (2) massing and scale, (3) building height, (4) architectural style, (5) building orientation, (6) setbacks, (7) buffers, and (8) traffic. Applicant's land planner testified that the orientation of the townhouse rows perpendicular to Springvale Road and the cosmetic fronts along that road would render the townhouse rows compatible with single-family detached homes surrounding the subject property. Because the rows were massed together, there are additional setbacks along the eastern and western boundaries of the site to further buffer the use, and the double-row of street trees along Springvale Road would also lessen the impact of the alleys which would be perpendicular to Springvale Road as well. The 35-foot height limit and the traditional architectural style would mirror the houses in the surrounding neighborhood.

The Applicant's land planner also argued that the development under the RT-15 Zone would be *more* compatible than development under the R-60 Zone recommended in the Master Plan. Development under the R-60 Zone could result in "McMansions" bordering Springvale Road, with less green space and no public access space. He also maintained that RT-15 Zoning was more compatible than the existing school use because that use is institutional and has non-residential elements such as school bus parking.

Technical Staff addressed the issue of compatibility primarily in terms of density and land use. They determined that the RT-15 density was appropriate by applying the "tent effect" principle beginning with the 430 dwelling units per acre at the CBD core and transitioning north of the subject property. Technical Staff also found that the land uses were compatible, stating that there is a "*de facto*" presumption that townhomes and single-family detached homes are compatible because both are owner-occupied, single-family residential dwellings. Exhibit 45, p. 2.

The expert land planner appearing on behalf of SOECA and other individuals, Mr. Kenneth Doggett, testified that the proposed density was incompatible with the surrounding area because it is more than three times the density of the uses immediately surrounding the subject property. He opined that the density proposed combined with the need to preserve the environmental setting of the Riggs-Thompson House results in a massing and scale more similar to the urban densities found in the Central Business District. He also testified that the setback reduction along the southern property line removed many of the mature trees on the site which currently screen the community from the Central Business District. He opined that the cosmetic

facades along Springvale Road would not ameliorate the massing and scale because the homes would not always be viewed from the perspective directly confronting the property.

The District Council agrees with the Hearing Examiner that the density proposed at the subject property is incompatible with the surrounding area. While the RT-15 density is low compared to the density at the core of the Silver Spring Central Business District, a straight linear application of the tent effect principle ignores the abrupt transition from the high-intensity multi-family uses on the south side of Cedar Street to the older, smaller, single-family detached homes immediately north of Cedar Street. The density proposed is three times that of the immediately surrounding land uses and massed closely together in the center of the property. Despite the cosmetic facades and building orientation, it is difficult to say that the density, massing and scale of the rows of townhomes have a relation to the smaller, older single-family detached homes surrounding the subject property.

In addition, the District Council agrees with the Hearing Examiner that the Applicant failed to meet its burden of proof that the traffic impact of the development on the surrounding streets would be compatible or consistent with the Master Plan. The Schematic Development Plan currently shows access to the site via a private road bisecting the site and connecting to Pershing Drive and Ellsworth Drive. The private road bisects the environmental setting of the Riggs-Thompson House running east-west just to the north (rear) of the house. Before the Planning Board, the Applicant proposed a binding element which would have precluded access onto Springvale Road, but the Applicant withdrew this binding element before the Hearing Examiner after Staff to the Historic Preservation Commission indicated that they would not support the alignment of the private street shown on the Schematic Development Plan (because it was too close to the Riggs-Thompson House). The Applicant then submitted five additional alternative alignments of the private street, one of which did access onto Springvale Road. Exhibits 223-227.

Technical Staff reviewed the five additional alternative alignments of the private road, and determined that three could be supported by Staff, including the alignment which permitted access onto Springvale Road. Exhibit 232. These three alternative alignments proposed (1) to shift the alignment currently shown on the Schematic Development Plan further north toward Springvale Road, further away from the rear of the historic house, (2) move the road to the south in front of the historic house, and (3) permit access onto Springvale Road.

Technical Staff noted that while the first alignment was supportable, it would reduce the size of the public park proposed in the application. Exhibit 232. The opposition urged that this alignment still truncated the environmental setting and raised questions about whether the access so close to the existing intersection with Springvale Road and Pershing Drive would create an unworkable type of five-way intersection with Springvale Road, Pershing Drive, and the private access road. Exhibit 251.

The second alternative alignment considered supportable by Technical Staff proposed moving the access road further south, in front of the Riggs-Thompson House. Technical Staff noted that this would further disturb the environmental setting, possibly reduce the number of visitor parking spaces, which were already limited, and raised forest conservation issues because of the number of mature trees that currently exist along that portion of the site. Exhibit 232, p. 6. The opposition argued that this alignment would result in the reduction of even more mature

trees along the southern border of the property which both define the site and act as a visual screen for the views from the historic house's higher elevation. Exhibit 251.

The final alternative Technical Staff considered potentially supportable is the alignment proposed to access Springvale Road, thus avoiding any impact on the environmental setting. Technical Staff found that site circulation would improve with the full turning movement onto Springvale Road, but acknowledged that this alignment would permit cut-through traffic to avoid the existing traffic restrictions. The Applicant's traffic engineer also acknowledged that cut-through traffic could occur with this alignment, but did not present evidence as to what impact this would have on the neighborhood. The opposition's land planner believed that Springvale Road, which is very narrow, would be unable to handle the traffic, and possible overflow parking from the development, and still severely compressed the environmental setting. Other residents opposed this alignment because it permitted cut-through traffic from outside of the neighborhood. Exhibit 250.

In order to make a finding of compatibility, the District Council must assume that any one of the possible alignments is compatible with the neighborhood. Because the issue of cut-through traffic has not been addressed in one of the possible alignments, nor has the viability of the alignment south of the historic house, the District Council agrees with the Hearing Examiner that the Applicant failed to submit sufficient evidence to prove that the impact of traffic from the development is compatible with the surrounding streets.

The Public Interest

The Applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. When evaluating the public interest, the District Council normally considers Master Plan or Sector Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities, or the environment, and factors such as provision of affordable housing, location near public transportation, and other public amenities.

The subject property lies within the area covered by the 2000 North and West Silver Spring Master Plan. The parties agree, and there is no evidence to the contrary, that the Master Plan did not explicitly designate the subject property for development under the RT-15 Zone, and the District Council so finds.

Compliance with the Master Plan recommendations, however, is not mandatory in this case because the R-T Zones do not require it; rather, the courts have held that the Master Plan should be treated only as a guide in rezoning cases like this one. As stated in *Trail v. Terrapin Run*, 403 Md. 523, 527 (2008):

We have repeatedly noted that [master] plans, which are the result of work done by planning commissions and adopted by the ultimate zoning bodies, are advisory in nature and have no force of law absent statutes or local ordinances linking planning and zoning...

The consistency of the proposed land use, at the R-T 15 density, as well as the recommendations of the Planning Board and Technical Staff were considered at length in Part

V.A.1 of the Hearing Examiners report. The District Council agrees with the Hearing Examiner, that the proposed schematic development plan is inconsistent with the objectives of the Plan, particularly with regard to the recommended transition from the Central Business District to the neighborhood north of Cedar Street and with regard to the environmental setting of the Riggs-Thompson House.

While silent as to the subject property, many portions of the Master Plan when read together reveal its intent regarding the transition along the Cedar Street boundary. First, the master plan specifically recommended only the single row of single-family detached houses on the north side of Cedar Street as the appropriate transition between the higher density of the Silver Spring Central Business District and reconfirmed the solidly R-60 Zoning from Cedar Street to the north. Regarding the Cedar Street transition, the Plan recommended the houses for non-resident professional office special exceptions, and explicitly stated that the transition should be “by use, not by structure type.” Exhibit 139, p. 43. Nor do the proposed land use and zoning maps contained in the Master Plan support the Applicant’s argument that the “tent effect” should be applied at this transitional location. The tent effect explicitly adopted in the Silver Spring Master Plan ends abruptly at Cedar Street, which continues the recommended R-60 Zoning north to the Beltway.

While the density proposed here is inconsistent with the Master Plan, R-T zoning at a lower density may achieve some additional goals of the Master Plan. These goals are included in Chapter One of the Master Plan, which recommends preserving the existing residential character of the neighborhood by improving sidewalks and landscaping as well as public open space. R-T Zoning at this location may be more capable of achieving these goals than the underlying R-60 Zoning and for this reason, the District Council finds it appropriate to remand the case to the Hearing Examiner for revision of the schematic development at a lesser density, with less massing, than the current development plan.

The second area of controversy relating to the Master Plan is the size of the environmental setting designated by the Master Plan. The Applicant points to language in the body of the plan stating that the environmental setting consists of 37,056 square feet. The body of the Master Plan also contains language directing the reader to the Appendix on historic resources. This language states:

This section summarizes the historic nature of existing designated resources and provides a brief overview of sites to be considered for designation...Detailed evaluations of each site, prepared for consideration by the HPC, the Planning Board, and the County Council, are available in the appendix. Exhibit 139, p. 28.

Those opposing the application point to language contained in the Appendix as follows:

The environmental setting is 37,056 square feet as shown in the shaded area below pending approval of the Chelsea School special exception by the Board of Appeals. *In the event that the Chelsea School plan is not approved, the designated environmental setting is the entire 1.4-acre parcel (P73) on which the house is located. An important goal of the Chelsea School plan is the integration of the Riggs-Thompson House into the campus. Appropriate access to the house should be provided.* Exhibit 139 (emphasis supplied).

The Applicant argues that the 37,056 square foot environmental setting stated in the body of the Master Plan should be applied to the site because appendices are generally only a “slice in time” and not intended to be binding. Those in opposition, including Montgomery Preservation Inc., argue that the Plan intended the environmental setting to be the original 1.4-acre parcel if the Chelsea School no longer occupied the site.

Ms. Vicki Warren provided some legislative history related to the language contained in the Master Plan. She stated that the Master Plan was adopted at approximately the same time that the Chelsea School was considering purchasing the property. She testified that the property had originally been part of a 140-acre “country estate” of two prominent citizens, George Washington Riggs (founder of Riggs Bank) and William H. Thompson. Chelsea School asserted that it needed a portion of the 1.4 environmental setting to implement the School’s expansion plans. The Historic Preservation Commission recommended that the environmental setting include the entire 1.4 acres, but the County was under pressure of a lawsuit from the Sisters of the Holy Names (the prior owner who wished to sell the property). Ms. Warren also quoted from minutes from the Planning Board’s meeting on the preliminary draft of the plan, stating that “the setting may need to be modified if the property is redeveloped with a use other than the Chelsea School.” As late as 2001, the environmental setting showed two boundary areas surrounding the historic house, one for the 37,056 square feet for the Chelsea School and one the larger 1.4 acre parcel if the Chelsea School did not go forward. 6/30/11 T. 212-219; Exhibits 191. Ms. Judith Christensen, testifying on behalf of Montgomery Preservation Inc., expressed the opinion that the Board may have felt the smaller setting more appropriate given its integration into a larger campus. 6/30/11 T. 214-215.

Mindful of the principle that statutes should be construed according to their plain language, Maryland law also rejects interpreting “plain language” in a manner contrary to the legislative intent when that intent is clearly known. *Maryland-National Capital Park and Planning Commission v. Anderson*, 164 Md. App. 540, 569-570 (2005), *aff’d*, 395 Md. 172 (2006). The Hearing Examiner found that the evidence in this case to date supported the opposition’s argument that the Master Plan intended the environmental setting to be 1.4 acres if the Chelsea School no longer occupied the property.

The evidence in this case to date supports the arguments of those opposing the application that the Master Plan intended the environmental setting to be 1.4 acres in the event the Chelsea School abandoned its use of the property, in the opinion of the Hearing Examiner. The body of the Master Plan states that it “summarizes” the basis of its recommendations and specifically refers to the more detailed analysis in the Appendix. In addition, the testimony provided by Ms. Warren indicates that as late as 2001, Technical Staff required the Chelsea School to show both alternative environmental settings on its special exception plan if “the Chelsea School does not go forward.” 6/30/11 T. 246. This is consistent with the Master Plan’s rationale for the smaller environmental setting which may be appropriate when based on the Chelsea School’s plan to integrate the Riggs-Thompson House in its campus.

In the opinion of the Hearing Examiner, based on the evidence to date, now that the Chelsea School has abandoned its use of the property and in the context of the R-T 15 townhome development with no associated “campus”, the smaller environmental setting no longer meets what was clearly intended by the Master Plan, to frame the house in some historical context.

Whether the application is in the public interest also requires the Council to determine whether public facilities are adequate to support the proposed development. The Applicant's transportation planner, Mr. Martin Wells, analyzed the projected traffic impact of the development under both the Policy Area Mobility Review (PAMR) and Local Area Transportation Review (LATR) guidelines. While the traffic expert for those in opposition to the development criticized the accuracy of the County's LATR guidelines in projecting the actual traffic impact of the use, the District Council agrees with the Hearing Examiner, Technical Staff, and the Applicant that those guidelines are mandated by law and therefore should be applied. Other than anecdotal evidence, there is no expert testimony that supports the opposition's argument that traffic generated by the proposed development will be outside the mandated guidelines.

There was also uncontroverted evidence from the Montgomery County Public Schools that there is sufficient school capacity to accommodate the proposed development provided that the Applicant makes a school facility payment at the time of subdivision approval. Exhibit 45, Attachment 3. In addition, the uncontroverted evidence established that water and sewer will be available to service the development. Exhibit 45, p. 8.

While the opposition presented some objections to the number of specimen trees required to be removed from the subject property to accommodate the proposed development, Technical Staff advises that there are no environmental issues regarding the proposed use.

Conclusion

Based on the foregoing analysis and the Hearing Examiner's report, which is incorporated herein, and after a thorough review of the entire record, the District Council concludes that the application, as described in the final version of the SDP, does not satisfy the requirements of the RT-15 Zone and its purpose clause; that the application proposes a form of development that would be incompatible with land uses in the surrounding area; and that the requested reclassification to the RT-15 Zone is not sufficiently related to the public interest to justify its approval. Because the subject property may be appropriate for R-T Zoning at a lesser density, and because R-T Zoning may have the capability of achieving some goals of the Master Plan, the District Council finds that the application should be remanded to the Hearing Examiner in order to revise the schematic development plan to have less density and more breaks in massing, and to take further evidence regarding the size of the environmental setting for the historic resource. For these reasons and because approval of the instant zoning application, as presently described, will not aid in the accomplishment of a coordinated, comprehensive, adjusted, and systematic development of the Maryland-Washington Regional District, the application will be remanded to the Hearing Examiner in the manner set forth below.

Action

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Zoning Application No. G-892, requesting reclassification of 5.25 acres of land, described as Lot 58, Evanswood Section 1, and located at 630 Ellsworth Drive, Silver Spring, Maryland, from the existing R-60 Zone to the RT-15 Zone, is hereby **remanded** to the Hearing Examiner for revision of the Schematic Development Plan (SDP) and consideration by the Planning Board of the intended size of the environmental setting of the Riggs-Thompson House historic resource, given the language in Appendix D of the North Silver Spring Master Plan. The SDP should be reconfigured to propose residential townhouse (RT) development with less density and less massing so that it will be more compatible with the character of the transition from the Central Business District to the residential community north of Cedar Street and more consistent with the 2000 North and West Silver Spring Master Plan. The revised SDP should also resolve issues relating to the alignment of the private road to comply with the environmental setting of the historic site as set forth in the Master Plan and its Appendix D.

This is a correct copy of Council action.



Linda M. Lauer, Clerk of the Council